

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARK DANIELS, RASHID RAHMAN, FELIPE	:
RIVERA-CRUZ and TERRY MATHIS on behalf of	:
themselves and others similarly situated	:
	: 19-CV-8173(LAP)
Plaintiffs,	:
	:
- against -	:
	: DR. MOORES' SECOND AMENDED
	: PROPOSED PRETRIAL ORDER
DR. CAROL MOORES	:
	:
Defendant.	X

I. Full Caption of the Action

Consistent with the Order of the United States Court of Appeals, Second Circuit, dated August 2, 2023, the caption of this case for trial will be *Mark Daniels, Rashid Rahman, Felipe Rivera-Cruz, and Terry Mathis, on behalf of themselves and others similarly situated vs. Dr. Carol Moores*, 19-cv-8173(LAP) as set forth above.

II. Trial Counsel

For Defendant Moores:

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III. Subject Matter Jurisdiction

Plaintiff's position is that this Court has subject matter jurisdiction under 28 U.S.C §§ 1331 and 1343. Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 for violation of their rights secured by the Eighth Amendment to the United States Constitution.

Defendant's position, which is set forth more fully in Dr. Moores' opposition to Plaintiffs' motion for a preliminary injunction (Dkt. No. 449, 489), post-hearing brief (Dkt. No. 536), motion for a stay of this Court's preliminary injunction order (Dkt. No. 606-1), is that this Court lacks subject matter jurisdiction over this trial for a permanent injunction because: (1) Plaintiffs' arguments in support of their claim for permanent injunctive relief are based on events and issues that were not alleged in and otherwise post-date the filing of the Second Amended Complaint, (2) Plaintiffs do not have a cognizable claim for equitable relief tied to their Second Claim for Relief, which is the alleged basis for the injunction, and, finally, (3) Plaintiffs' request for injunctive relief has been rendered moot. See, e.g., Fox v. Bd. of Trustees of State Univ. of New York, 42 F.3d 135, 140 (2d Cir. 1994) ("When a case becomes moot, the federal courts lack[] subject matter jurisdiction over the action.") (internal quotation marks and citations omitted).

IV. Claims and Defenses

Plaintiffs seek permanent injunctive relief related to their second cause of action. The issues to be tried with respect to that claim are:

A. Whether Plaintiffs can satisfy their burden to prove, by a preponderance of the evidence, that DOCCS providers have violated – and continue to violate on an ongoing basis – the Plaintiff Class’ rights against Eighth Amendment deliberate indifference to medical care by demonstrating:

- (i) the Plaintiff Class has suffered an objectively and sufficiently serious deprivation of adequate medical care, and
- (ii) that DOCCS medical providers subjectively act with deliberate indifference by being aware of, but disregarding, a substantial risk of serious harm to the health of the Plaintiff Class members;

B. If the Court determines that Plaintiffs Class has actually succeeded on the substantive Eighth Amendment deliberate indifference claim outlined above, the issue then becomes whether Plaintiffs are entitled to an equitable remedy in the form of a permanent injunction. To satisfy their burden for entitlement to a permanent injunction, Plaintiff Class must prove, by a preponderance of the evidence, that:

- (i) The Plaintiff Class will be irreparable harmed in absence of a permanent injunction;
- (ii) That the balancing of the equities tips in their favor;
- (iii) There is no adequate remedy at law available to Plaintiff Class members absent a permanent injunction; and
- (iv) That the public interest will be harmed absent a permanent injunction.

In addition, Defendant has asserted several affirmative defenses that raise legal issues for the Court's consideration, including:

- A. Whether Plaintiffs lack standing;
- B. Whether the Court lacks subject jurisdiction over Plaintiffs' Second Cause of Action because:
 - (i) Plaintiffs' arguments in support of their claim for permanent injunctive relief are based on events and issues that were not alleged in and otherwise post-date the filing of the Second Amended Complaint,
 - (ii) Plaintiffs do not have a cognizable claim for equitable relief tied to their Second Claim for Relief, which is the alleged basis for the permanent injunction, and, finally,
 - (iii) Plaintiffs' request for permanent injunctive relief has been rendered moot; and
- C. Whether Plaintiffs' request for permanent injunctive relief is barred by the Eleventh Amendment because Plaintiffs have failed to establish an ongoing violation of federal law.

V. Fact Finder and Trial Length

This matter is to be tried by the Court without a jury, and it is anticipated that 6 days will be needed for trial.

VI. Consent to Trial by Magistrate Judge

The parties have not consented to a trial of this matter by a magistrate judge.

VII. Stipulation or Statements of Law or Fact Agreed to By All Parties

None at this time. Dr. Moores reserves the right to amend any stipulation of law or fact agreed to by the parties, up to and including commencement of the trial.

VIII. Witnesses

Dr. Moores may call any of the following witnesses either on her case-in-chief or on rebuttal:

- Dr. Carol Moores (in person);
- Dr. Afsar A. Khan (video);
- NP Albert Acrish (video);
- Dr. Ann Andola (video);
- NP Mary Ashong (video);
- Dr. David DiNello (video);
- Dr. John Hammer (video);
- Dr. Kathleen Mantaro (video);
- Dr. David Karandy (video);
- Dr. Chung Lee (video);
- Dr. Susan Mueller (video);
- NP Kristin Salotti (video);
- Dr. Paula Bozer (video);
- Dr. Mikhail Gusman (video);
- Dr. John Morley (video);
- NP Valerie Monroe (video);
- NP Shibi Kacchapilly (video);
- NP Terrie Armbruster (video);
- NP Ashley Harris-Baker (video);
- Dr. Veronica Ruiz (video);
- Dr. Hend Abdelwahab (video);
- NP Randie Schrader (video);
- Dr. R. D'Amico (video);
- NP Sue Devlin-Varin (video);
- NP Ifeoma Awaka (video);
- NP Mahnaz Sullivan-Davachi (video);
- NP Angela Bode (video);
- Dr. Ellen Gomprecht (video);
- Dr. Brian Connolly (video);
- NP Brandi Corigliano (video);
- Dr. Arul Kannan (video);

- Dr. Pritti Mandalaywala (video);
- Dr. Kyoung Kim (video);
- NP Dahlia Wiggan (video);
- NP Haisy Ann Pitt (video);
- Dr. Gaetan Zamilus (video);
- Dr. Shazia Chaudhry (video);
- NP Katie Ngbodi (video);

Dr. Moores reserves the right to amend her Witness list at any time up to and including commencement of the trial either for her case-in-chief or for rebuttal.

IX. Deposition Testimony to be Offered at Trial

Dr. Moores may offer the following deposition testimony either in her case in chief or on rebuttal:

- Mark Daniels Transcript, pp. 151:18-155:18; pp. 172:3-175:3; pp. 180:24-184:6, pp. 188:18-190:4
- Wayne Stewart Transcript, pp. 105:25-108:11

Defendant Moores reserves the right to read into evidence the deposition testimony of any witness who is not available to testify, or to impeach the witness.

X. Exhibit List

Defendant's List:

<u>Exhibit Number</u>	<u>Description</u>	<u>Objection</u>
D-1(a)	MWAP POLICY 1.24 (revised 9/10/18)	
D-1(b) ¹	MWAP POLICY 1.24 (6/1/17 with medications list)	

¹ Dr. Moores is amending previously admitted hearing exhibit D-1 to include the complete, original 6/1/2017 version of MWAP Policy 1.24, inclusive of the affixed list of MWAP medications. The list of MWAP medications was

D-2	MWAP Policy 1.24A Health Services Policy 1.24A	
D-3	10/31/22 Email from Carol A. Moores, M.D.	
D-4	Medical Records for Ronald Alston RALSTON DEF 000001 – RALSTON DEF 000146; MOORES-10476 – MOORES-10543	
D-5	Medical Records for Thomas Briel BRIEL DEF 000001 – BRIEL DEF 000173; MOORES-10734 – MOORES-10744	
D-6	Medical Records for Marc Confessore CONFESSORE DEF 000003 – CONFESSORE DEF 38; CONFESSORE DEF 52; CONFESSORE DEF 101 – CONFESSORE DEF 126; CONFESSORE DEF 185 – CONFESSORE DEF 194; CONFESSORE DEF 209 – CONFESSORE DEF 213; CONFESSORE DEF 226 – CONFESSORE DEF 241; CONFESSORE DEF 367 – CONFESSORE DEF 396; CONFESSORE DEF 409 – CONFESSORE DEF 427; CONFESSORE DEF 595 – CONFESSORE DEF 627; MOORES-10760 – MOORES-10790	
D-7	Medical Records for John Crosby CROSBY DEF 000914 – CROSBY DEF 000963; CROSBY DEF 000965 – CROSBY DEF 001124; CROSBY DEF 001223 – CROSBY DEF 001451; MOORES-10791 – MOORES-10877	
D-8	Medical Records for Thomas Curry CURRY 000001 – CURRY 000114; CURRY DEF 000001 – CURRY DEF 000123; MOORES-10878 – MOORES-10879	
D-9	Medical Records for Mark Daniels MDANIELS DEF 000028 – MDANIELS DEF 000033; MDANIELS DEF 000034 – MDANIELS DEF 000039; MDANIELS DEF 000040 – MDANIELS DEF 000054; MDANIELS DEF 000055 – MDANIEL DEF	

inadvertently left off D-1 when entered during the February 2021 Preliminary Injunction hearing. (See Preliminary Injunction Hearing Transcript, at Dkt. No. 541, p. 30:24 – p. 31:7)

	000069; MOORES-10881 – MOORES-10890	
D-10	Medical Records for Anthony Griggs GRIGGS 000001 – GRIGGS 000102; GRIGGS 000103 – GRIGGS 000108; GRIGGS 000109; MOORES-10891 – MOORES-11025	
D-11	Medical Records for John Hinespeter HINESPETER DEF 000002 – HINESPETER DEF 000335; MOORES-11032 – MOORES- 11042	
D-12	Medical Records for Anthony Jackson AJ 000001 – AJ 000060; AJ 000074 – AJ 000075; A JACKSON DEF 000001 – A JACKSON DEF 000062	
D-13	Medical Records for Eric Lindemann LINDEMANN DEF 000001 – LINDEMANN DEF 000146; MOORES-11043 – MOORES- 11047	
D-14	Medical Records for Terry Mathis OAG TM 002449 – OAG TM 002515; OAG TM 002516 – OAG TM 002560; OAG TM 002561 – OAG TM 002706; MOORES- 11048 – MOORES-11170	
D-15	Medical Records for Rafael Montanez MONTANEZ DEF 000001 – MONTANEZ DEF 000075; MONTANEZ DEF 000083 – MONTANEZ DEF 000084; MONTANEZ DEF 000099; MOORES-11171 – MOORES- 11198	
D-16	Medical Records for Ramal Myriee MYRIEE 000010 – MYRIEE 00047; MYRIEE 000059 – MYRIEE 000060; MYRIEE 000062 – MYRIEE 00070; MYRIEE 000073 – MYRIEE 000134; MYRIEE DEF 000007 – MYRIEE DEF 000072; MYRIEE DEF 000075 – MYRIEE DEF 000080; MYRIEE DEF 000084 – MYRIEE DEF 000091; MYRIEE DEF 000093 – MYRIEE DEF 000101; MYRIEE DEF 000123 – MYRIEE DEF 000130; MYRIEE DEF 000132 – MYRIEE DEF 000145; MYRIEE DEF 000147 – MYRIEE DEF 000159; MYRIEE DEF 000161 – MYRIEE DEF 000165; MOORES-11200 – MOORES-11280	

D-17	Medical Records for Robert Oleman OLEMAN DEF 000001 – OLEMAN DEF 000028; MOORES-4032	
D-18	Medical Records for James Pine PINE DEF 000001 – PINE DEF 000183; MOORES-11281 – MOORES-11315; MOORES-13973 – MOORES-13989	
D-19	Medical Records for Alan Sherry SHERRY 000001 – SHERRY 000015; SHERRY 000078 – SHERRY 000124; SHERRY 000359 – SHERRY 000375; MOORES-12524 – MOORES-12572	
D-20	Medical Records for Wayne Stewart OAG WS 000221 – OAG WS 000438	
D-21	Medical Records for Miguel Tirado TIRADO 000133 – TIRADO 000248; MOORES-12573 – MOORES-12698	
D-22	Medical Records for Richard Vasquez OAG MWAP 005040 – OAG MWAP 005042; OAG RV 000001 – OAG RV 000297; RV 000001 – RV 000068; RV 000273 – RV 000383; MOORES-12699 – MOORES-12721	
D-23	Medical Records for Kenneth Windley WINDLEY DEF 000742 – WINDLEY DEF 000772; WINDLEY DEF 000895 – WINDLEY DEF 000906; WINDLEY DEF 000907 – WINDLEY DEF 000925; MOORES-13945 – MOORES-13972	
D-24	Medical Records for Matthew Herbert HERBERT DEF 000001 – HERBERT DEF 0000194; MOORES-11026 – MOORES-11031	
D-25	Medical Records for Tina Vivenzio MOORES-12776; MOORES-12793 – MOORES-12837; MOORES-12871 – MOORES-12889; MOORES-12893; MOORES-12899; MOORES-12916; MOORES 13017 – MOORES-13030; MOORES-13033 – MOORES-13044; MOORES-13046 – MOORES-13047; MOORES-13060; MOORES-13119; MOORES-13121 – MOORES-13128; MOORES-13131; MOORES-13133 – MOORES-13138; MOORES-13160 – MOORES-13176; MOORES-13563 –	

	MOORES-13601; MOORES-13604 – MOORES-13610; MOORES-13613 – MOORES-13621; MOORES-13637 – MOORES-13653; MOORES-13657 – MOORES-13666; MOORES-13689 – MOORES-13706; MOORES-13711 – MOORES-13714; MOORES-13716 – MOORES-13807; MOORES-13848 – MOORES-13860; MOORES-13863 – MOORES-13879; MOORES-13891 – MOORES-13913	
D-26	Medical Records for Joyce Powell MOORES-11316 – MOORES-11321; MOORES-11329; MOORES-11365 – MOORES-11451; MOORES-11469 – MOORES-11474; MOORES-11478 – MOORES-11485; MOORES-11501 – MOORES-11507; MOORES-11540 – MOORES-11548; MOORES-11690; MOORES-11856 – MOORES-11857; MOORES-11859 – MOORES-11860; MOORES-11863 – MOORES-11869; MOORES-11871 – MOORES-11890; MOORES-11896 – MOORES-11899; MOORES-11903 – MOORES-11983; MOORES-12048; MOORES-12050; MOORES-12051; MOORES 12054 – MOORES-12069; MOORES-12074 – MOORES-12081; MOORES-12087 – MOORES-12088; MOORES-12090; MOORES-12094 – MOORES-12096; MOORES-12113 – MOORES-12171; MOORES-12222 – MOORES-12223; MOORES-12355 – MOORES-12366; MOORES-12424 – MOORES-12432; MOORES-12463; MOORES-12473; MOORES-12479 – MOORES-12482; MOORES-12488 – MOORES-12489; MOORES-12494 – MOORES-12496; MOORES-12499; MOORES-12503; MOORES-12507 – MOORES-12516; MOORES 12520 – MOORES-12523	
D-27	Medical Records for Samson Burch BURCH DEF 000029 – BURCH DEF 000047; BURCH DEF 000133 – BURCH	

	DEF 000155; MOORES-10745 – MOORES-10756	
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Dr. Moores reserves the right to amend her Exhibit list at any time up to and including commencement of the trial. Dr. Moores further reserves the right to refer to any exhibits previously entered into the record during the preliminary injunction trial.

Respectfully submitted,

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SO ORDERED _____, 2023

Hon. Loretta A. Preska, U.S.D.J.